

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

April 9, 1999

ORDER ADDRESSING
SUBLOOP AND EXTENDED
LINK ISSUES (E3 and E7) -
Part 2

MID-MAINE TELPLUS
Request for Arbitration of an Interconnection
Agreement with Bell Atlantic

Docket No. 98-593

MID-MAINE TELPLUS
Request for Commission Investigation of
Unreasonable Acts and Discriminatory
Practices of Bell Atlantic - Maine Regarding
Interconnection Rates, Terms and Conditions

Docket No. 98-806

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION AND SUMMARY

In this Order we address in detail Issues E3 (access to subloops) and E7 (access to extended links). The Order issued on March 23, 1999 stated our decisions, our legal and factual conclusions and the future proceedings we will hold concerning both issues. In the case of subloops it discussed many of the issues in detail. This Order contains our full current analyses of both issues. As discussed below, further proceedings will be necessary to resolve both issues finally. This Order supersedes the discussions of Issues E3 and E7 in the March 23 Order.

We decide that we have authority under the Telecommunications Act and under state law to establish additional unbundled network elements (UNEs), specifically subloops and extended links. We open a proceeding pursuant to 35-A M.R.S.A. § 1303 to determine several issues. First, we must determine whether subloops and extended links presently exist as network elements in Bell Atlantic's network. Second, we must determine whether Mid-Maine Tel Plus's (MMTP) ability to offer the services it seeks to offer will be "impaired" (within the meaning of 47 USC § 251 (d)) if we do not require access to subloops or extended links. In determining the impairment question, we will require the parties to present evidence concerning the availability of various alternatives to MMTP, including self-supply, the availability of alternatives from Bell Atlantic and the availability of alternatives from third parties. Finally, we must decide if access to subloops and extended links is technically feasible.

In addition, we will address whether MMTP may obtain the functional equivalent of extended link through collocation. That alternative may also be used for one of the

comparisons that will be necessary for the purpose of determining whether MMTP's ability to provide the service it seeks to offer is impaired.

In this Order, we will first consider issues that are common to both sublinks and extended links, including the legal basis for our ability to order additional UNEs and the need for us to conduct a proceeding pursuant to state law. We will then separately consider issues that are specific to access to subloops and access to extended links.

II. ISSUES E3 AND E7- SUBLOOP UNBUNDLING AND EXTENDED LINK

A. General Considerations

In the *Local Competition Order*¹ the Federal Communications Commission (FCC), acting pursuant to 47 USC § 251 (c)(3) and (d)(2), established seven unbundled network elements (UNEs) that incumbent local exchange carriers (ILECs) must provide to "requesting carriers," including competitive local exchange carriers (CLECs). Those UNEs included "local loops" and "interoffice transmission facilities." Both of those elements are relevant to the issues we address here. As described in greater detail below, the United States Supreme Court vacated the FCC's establishment of all seven UNEs in *AT&T Corp. v Iowa Board Of Utilities*, ___ U.S. ___ (1999).² We address here whether state utility commissions have independent authority under the Telecommunications Act of 1996 (TelAct) to determine that an ILEC must provide a UNE that is additional to those ordered by the FCC.

Whether the Commission has the authority to establish additional UNEs is relevant to both the subloop and extended link issues. In the *Local Competition Order* the FCC did not establish either subloops or extended links as UNEs. The FCC specifically discussed the possible establishment of subloops as a UNE. It declined to do so, but stated that state commissions could consider the issue in arbitration proceedings. The FCC did not discuss the question of extended loops. It did, however, rule that ILECs must combine UNEs upon request. An extended link can be considered

¹The *Local Competition Order* is the order issued by the FCC that comprehensively addresses interconnection, unbundled network elements and collocation issues under the TelAct. The full citation of that Order is *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996).

²For the purpose of analyzing the subloop and extended link issues in this case, we will assume that the FCC, following the reversal by the Supreme Court and remand from the Court of Appeals, will determine that local loops and interoffice transportation facilities are UNEs, or that ILECs must provide those facilities under certain conditions. If the FCC does not make such determinations, it may be necessary to reopen and reconsider any decisions we make in this Order. Bell Atlantic and other RBOCs have stated to the FCC that they will continue to provide the seven UNEs previously ordered by the FCC pending FCC action following the remand.

a combination of a local loop and an interoffice transmission facility. The FCC's rule (47 CFR § 51.315(c)) requiring ILECs to combine UNEs was vacated by the Court of Appeals for the Eighth Circuit. The Supreme Court did not address that ruling by the Court of Appeals. The Court of Appeals decision therefore stands. For that reason, as explained in further detail at subpart C below, we consider in this proceeding whether we may order an extended link as an additional single UNE.

We decide that we have authority to order access to an additional UNE under the TelAct. We also decide that we may order access to additional UNEs under state law, because of the FCC's ruling that state commissions may do so. As applied in this case, we find no substantive difference between the requirements of state and federal law.

We consider first our authority under the TelAct. Section 252(b)(4)(C) requires state commissions in arbitration proceedings to decide all issues presented in the arbitration petition, and section 252(c)(1) requires commissions to ensure that their resolutions of those issues "meet the requirements of section 251, including regulations prescribed by the Commission [FCC] pursuant to section 251." One of the specific requirements of section 251 is found in subsection (c)(3), which requires ILECs to provide "access to network elements on an unbundled basis at any technically feasible point" Nothing in the TelAct states that the FCC has exclusive authority over designating UNEs. Nothing in the TelAct states that state commissions in TelAct arbitration proceedings have no authority to order additional UNEs.

As discussed above, the FCC clearly has authority to establish UNEs, because section 251(d)(2) states the standards the FCC must consider when it does so. Nevertheless, section 251 does not expressly require the FCC to establish UNEs, providing further indication of Congress' intent that there be dual federal and state jurisdiction over the establishment of UNEs.

The FCC itself ruled that state commissions have authority to establish additional UNEs. In the *Local Competition Order* and in 47 C.F.R. § 51.317 the FCC ruled that state commissions, in arbitration proceedings under the TelAct, may order ILECs to provide UNEs beyond the "minimum" list the FCC itself ordered in 47 C.F.R. § 51.319 (now vacated by the Supreme Court). Section 51.317 requires a state commission in arbitration proceedings to order additional UNEs unless it makes certain findings specified in that section.³ The FCC further recognized that a state commission

³As discussed below, we conclude that the findings required by section 51.317 for meeting the "impairment" standard of TelAct section 251 (d)(2)(B) are no longer valid in light of the Supreme Court's reversal of the FCC's establishment of UNEs. Other portions of section 51.317 remain valid, however. For example, nothing in the Court's decision provides any indication that 47 C.F.R. § 51.317(a) should be considered effectively vacated; that subsection's standard for determining "technical feasibility" of "access" to a UNE was unchallenged and therefore remains fully valid under the Act.

in an arbitration proceeding may confront issues that are unique to that state and that state commissions possess “significant expertise.” *Local Competition Order*, ¶ 244.

The *Local Competition Order* appears to state two bases for the FCC's conclusion that state commissions have the authority to establish additional UNEs. The FCC's regulations appear to rely on a third basis. The Order stated that states have the authority to order additional UNEs pursuant to *state law*. *Local Competition Order* ¶ 244. To support this proposition, the FCC relied on 47 U.S.C. § 252(e)(3), which states:

(3) PRESERVATION OF AUTHORITY.--Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its *review* of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(emphasis added)

Section 252(e) generally addresses the “review” stage of state commission proceedings. The wording and structure of subsections (a)-(e) of Section 252 make clear that the “review” stage occurs *after* the “negotiation” or “arbitration” stages of state commission proceedings under section 252.⁴

Another part of the *Local Competition Order* refers to TelAct section 47 U.S.C. § 251(d)(2) as the basis for both the FCC's and state commissions' authority to order UNEs. *Local Competition Order* ¶¶ 281-283. Section 251(d)(2) contains the standards that the FCC must consider in determining whether to order access to UNEs. The subsection does not mention state commissions.

47 C.F.R. § 51.317 of the F.C.C. regulations appears to state a third basis.

Subsection (a) also states the FCC's ruling that state commissions must “determine what elements should be made available” . . . beyond those ordered by the FCC. That portion of the regulation remains valid because it was unchallenged.

⁴ In the “review” the state commission may reject a negotiated agreement if the agreement discriminates against a carrier that is not a party to the agreement or is inconsistent with the public interest; it may reject an arbitrated agreement if it does not meet the requirements of section 251 or the pricing standards of section 252(d).

Section 252(e)(1) requires a state commission to “review” an interconnection agreement “adopted by . . . arbitration” even though the same state commission has already “resolved” each issue in the arbitration under section 252(2).

In determining what network elements should be made available *for purposes of section 251(c)(3) of the Act* beyond those identified in § 51.319 of this part, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

(emphasis added.)

The FCC's conclusion that state commissions do have such authority (whatever its basis or bases) was not challenged on appeal and is therefore valid law.

Whatever the merits of the FCC's analysis of our authority, we conclude that the law of Maine, specifically 35-A M.R.S.A. § 1306, allows this commission to order Bell Atlantic to provide network elements, so long as our actions do not conflict with federal law.

Bell Atlantic argues that this Commission cannot address the question of additional UNEs until after the FCC has reconsidered the question of establishing new UNEs in light of the Supreme Court ruling that vacated the original list of FCC-established UNEs. Bell Atlantic argues that the Supreme Court's rationale in support of its various rulings establishes that the *FCC* must reconsider the "necessary" and "impairment" standards in light of the Supreme Court's rulings, and that it must establish new UNEs or regulations governing the establishment of UNEs before any state commission may take any action with regard to establishing a UNE. We disagree. While any regulations that the FCC does establish will undoubtedly preempt any inconsistent state commission decision, nothing in the Supreme Court's opinion or in the language of the Tel Act suggests that states must refrain from establishing UNEs until after the FCC acts. As discussed above, we believe that the Tel Act requires us to decide all questions presented to us in an arbitration, including claims that we must establish additional UNEs. The FCC also specifically ruled that states in arbitration proceedings may order additional UNEs.

In essence, Bell Atlantic seeks to extend the logic of the Supreme Court's holding that *pricing* of UNEs is within the FCC's authority, into the question of whether, at least at this time, only the FCC may decide the identity of UNEs. Whatever the merits of Bell Atlantic's logic, the argument fails for the simple reason that the portions of the FCC order and rules stating that independent state commissions have authority to establish UNEs was not challenged at the Supreme Court and stands as good law. We thus find nothing in the Supreme Court's ruling that suggests we should presently either ignore our obligation under the TelAct to resolve issues brought to us for arbitration or decline to exercise our independent state authority to require appropriate interconnection arrangements among carriers.

We will, therefore, we open a proceeding under 35-A M.R.S.A. § 1303 to address the subloop and extended link issues raised in the arbitration proceeding. On

October 16, 1998, MMTP filed a request that we commence such an investigation pursuant to sections 1302(3) and 1303. That request was assigned Docket No. 98-806. The Hearing Examiner asked the parties in a telephone conference in December if it would be acceptable to address whether to open such an investigation in the Examiner's Report, once it became clearer to the advisors, after consideration of all the issues, whether such an investigation might be necessary. Both parties agreed the matter could be addressed in the Examiner's Report. Having considered the bases for the FCC's determination that state commissions in arbitration proceedings could establish additional UNEs, and the deadline imposed by 47 U.S.C. § 252(b)(4)(c), the Examiner recommended that the Commission open an investigation pursuant to 35-A M.R.S.A. § 1303 for the purpose of addressing the issues in Issues E3 and E7. We agree with the Examiner's recommendation and we open that investigation.⁵

We find that the arbitration procedure has provided the parties the procedural rights required under 35-A M.R.S.A. §§ 1304 and 1305, including an opportunity to present evidence and argument addressing the section 1306 standard (unreasonable act or practice). For Issues E3 and E7, we find that it is necessary to conduct further proceedings to address unresolved issues. We do so in the section 1303 proceeding because of the time constraints imposed by TelAct, which we cannot meet.

In the section 1303 proceeding we must consider certain factual issues described in TelAct sections 251(c) and (d)(2). We must consider whether the proposed network elements are presently part of BA-ME's network. We must determine whether the proposed access to the proposed network elements is at technically feasible points. Finally, we must determine whether denial of access to each of the proposed network elements will "impair" MMTP's ability to provide the service(s) it seeks to offer, within the meaning of 47 USC § 251(d)(2), as interpreted by the Supreme Court in *AT&T v. Iowa Utilities Board*. For subloops, it might be possible to make the first finding on the current record, but we cannot make the second or third findings. For extended link, it might be possible to make the second finding (technical feasibility), because Bell Atlantic has not raised objections on that ground. Nevertheless, because of the likely interrelationship among these required findings we will not make any of them at this time, and we will use the section 1303 proceeding to address each of the three factual issues for both subloops and extended links.

We discuss general principles relevant to the three factual issues immediately below.

⁵As in *CTC Communications Corp., Request for Commission Investigation Into Unlawful and Unjust Practices and For an Award of Civil Damages and Civil and Criminal Penalties Against Bell Atlantic-Maine*, Docket No. 98-208, Order Addressing Jurisdictional Issues (May 18, 1998), we decline to address whether one public utility may bring a complaint as of right against another utility under 35-A M.R.S.A. § 1302(3). Addressing that issue is unnecessary here as well because we decide on our own motion to open an investigation under section 1303.

To assist the parties to focus the evidence and argument in the section 1303 proceeding, we have outlined below our current view of the record as it may apply to each of these issues at subparts B (subloops) and C (extended links) below.

In determining whether to order access to a new network element, the first question is whether the requested network element is part of the ILEC's network. A network element is defined (in part) as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). ILECs have the duty to provide UNEs to "requesting telecommunications carriers." 47 U.S.C. § 251(c)(3). An ILEC must provide UNEs and access to UNEs that are equal in quality to those it provides to itself. 47 C.F.R. § 51.311(b). We believe that implicit in these definitions and requirements is that for something to be a network element, it must be something the ILEC provides to itself for use in its own network. We will consider below whether subloops and extended links exist within part of BA-ME's network.

47 U.S.C. § 251 (c)(3) requires ILECs to provide "access to network elements at any technically feasible point. . . ." As will be discussed in connection with subloops at subpart B below, technical feasibility does not include issues relating to operations support systems (OSS). We note that the question of technical feasibility applies only to "access" to UNEs and not to the question of whether a particular portion of the network must be unbundled. MMTP points out correctly that the Court of Appeals in *Iowa Board of Utilities*, in interpreting 47 U.S.C. §251(c)(3) and (d)(2), reversed the FCC's ruling that the FCC and the states must consider "technical feasibility" in determining whether a portion of the network should be offered as an unbundled network element. The Court of Appeals' ruling was not reversed by the Supreme Court.

Neither party has raised any other legal issues concerning the technical feasibility requirement. We therefore will rely on the FCC's statements concerning the issue in the *Local Competitive Order* at 192-206 (which apply both to access to UNEs and to interconnection), and the definition of the "technically feasible" regulations:

Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is

technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

47 C.F.R. § 51.5.

As stated in that provision (for adverse network reliability effects) and again at 47 CFR § 51.321 (d), for all technical feasibility issues ILECs have the burden of disproving technical feasibility.

The third factual issue is whether MMTP's ability to provide the services it seeks to offer would be "impaired" if it were denied access to a UNE, in this case, subloops and extended links. We must address the meaning of "impairment" in light of *AT&T v. Iowa Board of Utilities*. 47 U.S.C. § 251 (d)(2) states:

Access Standards - In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the service that it seeks to offer.

Under the statute, the more stringent "necessary" standard applies only to elements that are proprietary.

Bell Atlantic has made no claim that an extended link or the local loops and interoffice transmission facilities components of extended links are proprietary. Accordingly, we need only to address only the "impairment" standard for nonproprietary elements.⁶

⁶The Supreme Court's discussion of these standards in Part III, B of *AT&T v. Iowa Board of Utilities* generally joined the two standards together and did not distinguish between them. Nevertheless, it is clear that the Court was aware of the difference, as it stated:

But that judgment allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services.

Pursuant to Section 251 (d)(1) and (2), the FCC in the *Local Competition Order* established seven UNEs. The Supreme Court held that in establishing those UNEs, the FCC had misinterpreted the "impairment" standard in the statute. The Court also vacated the FCC regulations, 47 C.F.R. § 51.319, that established the seven UNEs. The Court ruled that the proper comparison is not, as the FCC had determined, between the requested UNE and some other UNE offered by the ILEC. The proper comparison is between the cost of providing the service using ILEC subloops versus the cost to the requesting carrier if it were to use its own facilities or facilities it could acquire from sources other than itself or the ILEC. In addition, the cost differential must be more than *de minimis*.⁷

The issuance by the Supreme Court of a new and critical interpretation of the statutory standard long after the close of evidence and briefing, and within days of the deliberations in this case, could not reasonably have been anticipated by the parties.⁸ Both parties should be provided an opportunity to address the new standard with evidence and, if necessary, argument. Because, as noted above, the TelAct time limits do not permit an extension of the arbitration case *per se* to take additional evidence, we will address these issues in our proceeding under 35-A M.R.S.A. §1303.

We now turn to consideration of issues that are relevant separately to subloops and extended links.

B. Subloops

A subloop is a portion of a local loop that is accessible and severable at various points along the loop. One example is the distribution portion of the loop,

____ U.S. ____ (Part III, B). In addition, Part I of the Opinion characterized one of the challenges of the incumbent LECs, as follows:

The LECs complained that, in compiling [the] list [of UNEs], the FCC had virtually ignored the 1996 Act's requirement that it consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service.

⁷We will not attempt at this time to decide now how much that cost differential must be. The Court offered little specific guidance.

⁸In light of the Supreme Court's conclusion concerning impairment, we do not consider ourselves bound by 47 C.F.R. § 51.317(b)(2), which states the same erroneous standard with regard to impairment that the FCC applied to its own determinations under 47 U.S.C. § 251(d).

running from a facilities connection point in a remote facility housing (known as a Feeder/Distribution Interface (FDI)) to a customer's premises.

MMTP seeks access to subloops so that it may provide a fully-copper loop of less than 18,000 feet in order to supply customers with xDSL service. As explained in Issue B9 (Use of Copper Facilities), copper is presently the most economically feasible way to provide xDSL service in a limited geographic area to all but very large customer concentrations. BA-ME uses fiber for the distribution portions of many loops, for example, between the central office and an FDI. To provide a loop consisting entirely of copper to its customers, MMTP claims that it must have access at or after the point that the copper portion of the loop begins.

The TelAct granted authority to the FCC to establish unbundled network elements (UNEs). In the *Local Competition Order* the FCC established the local loop as a UNE. The FCC declined to establish a subloop as a separate UNE, stating that it did not have enough information to resolve many of the technical objections raised by ILECs. However, it also stated that state commissions in arbitration proceedings could address those questions and had the authority to establish additional UNEs.

In order to create a subloop UNE, we must find that subloops are presently part of BA-ME's network. MMTP has effectively defined them as portions of loops that can be physically severed from the entire loop and be accessed at places such as FDIs, i.e., places at which MMTP claims access is technically feasible. We do not understand that MMTP desires access at places along unseverable fiber or copper spans, or that it claims access is technically feasible under such circumstances. It appears, therefore, that there is a considerable overlapping between the issues of whether subloops are part of BA-ME's network and whether access is technically feasible.

The parties disagree as to whether it is technically feasible to provide access to subloops and whether the Commission may consider other feasibility (primarily "operational") questions. BA-ME raises an "array" of issues it describes as "technical" and "operational" to the provision pertaining to subloop unbundling.⁹ MMTP specifically contests some of BA-ME's technical objections, but does not address many others.

The record does not presently establish that it is "technically feasible" for MMTP to access loops at the sub-loop level. As part of the section 1303 proceeding, we will require the parties to use a supervised bona fide request (BFR) process, as further described below, to address that issue.

⁹We will not repeat here the rather extensive list of concerns raised by BA-ME in its briefs and testimony. They are stated in detail in its Direct Presentation, pp.31-33, and in its Post-Hearing Brief, pp.30-34.

BA-ME raises the specific objection that its Operations Support Systems (OSS) are not capable of dealing with service orders for subloop unbundling. We do not agree with Bell Atlantic that OSS issues are to be considered in determining whether access to subloops is technically feasible. As discussed at Issue E6 in the March 23 Order, until the reversal by the Supreme Court, OSS was a UNE under FCC rules. OSS "functions" were defined as:

pre-ordering, ordering, provisioning, maintenance and repair,
and billing functions supported by an incumbent LEC's
databases and information.

47 C.F.R. §51.319(f)(1).¹⁰

The FCC's general discussion of the "technically feasible" standard in the *Local Competition Order* ¶¶192-206 did not make clear whether OSS matters are relevant to a determination of whether access to a UNE at a specific point is technically feasible. The FCC noted that some commenters had proposed OSS as a "factor" to be considered (*Local Competition Order* (¶195)) and that other commenters

ask the Commission to make clear that technical feasibility does not require that operations support systems for order processing, provisioning and installation, billing, and other support functions be in place in order to make a specific interconnection point technically feasible.

Local Competition Order ¶196. The FCC did not provide a clear answer to this question in its discussion of the "technically feasible" standard. It stated:

We conclude that the term "technically feasible" refers solely to *technical* or *operational* concerns, rather than economic, space, or site considerations.

Local Competition Order ¶198 (emphasis added).

It also stated, however:

[We do not] believe the term "technical," when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3), includes consideration of accounting or billing restrictions.

Id. ¶201.

¹⁰While all of section 51.319 has been vacated by the Supreme Court, we believe this description of the kinds of activities that constitute OSS is likely to survive on remand.

MMTP agrees that "true *operational* and technical issues" are relevant considerations. MMTP's view of "operational" does not however, appear to extend to most matters that might be considered part of OSS.

We find more definitive guidance on the question of whether OSS issues should be considered a "technical or operational" concern in the FCC's discussion that specifically addresses whether the FCC (or the states) should order subloop unbundling:

Several LECs and USTA, for example, assert that incumbent LECs *would need to create databases for identifying, provisioning, and billing* for subloop elements. Further, incumbent LECs argue that there is insufficient space at certain possible subloop interconnection points. We note that these concerns do not represent "technical" considerations under our interpretation of the term "technically feasible."¹¹

Local Competition Order ¶390.

This passage provides an answer to at least some of BA's concerns. BA has argued, for example, that:

Fourth, the operations support system and operational practices in existence today would require substantial modifications to support mid-Maine's unbundling proposal. A basic premise underlying all of BA-ME's operations is that a loop is ordered and installed all the way from the central office to the end user's location. Sub-loop unbundling would change this fundamental principle. With different beginning and end points for sub-loop facility, extensive software development would be required to modify operations systems involved with service orders, equipment inventory, facility assignment, customer records, testing, trouble reports, and physical plant records.

B-A Direct Presentation at 31.

And these are just the provisioning impediments. Perhaps a more fundamental, threshold issue is how does a CLEC even order a subloop? BA-ME has no mechanized

¹¹We have omitted the FCC's footnotes to this passage. In those omitted footnotes, NYNEX is among the LECs identified as making the assertions described in the first sentence of the quoted passage. Both NYNEX and Bell Atlantic are identified as making the argument described in the second sentence.

database with which to inventory subloops. All of BA-ME's existing pre-ordering and ordering systems have been designed for service on an end-to-end basis. Thus, BA-ME cannot readily answer the most basic CLEC inquiry: whether a particular customer is even served through an FDI.

B-A Post-Hearing Brief at 33.

MMTP points out that if OSS problems may be raised as a legitimate objection to ordering of new UNEs, it would be impossible for the FCC or a state commission ever to order a new UNE. If Bell Atlantic has designed an OSS that is so inflexible that it does not readily accommodate the ordering and implementation of new UNEs, that defect should not and cannot be used as an excuse against the establishment of new UNEs. CLECs and other requesting carriers should not be penalized by limited planning by ILECs, or by the failure by an ILEC to recognize that the FCC and state commissions can and will establish additional UNEs.

Many of BA-ME's technical objections do not relate to OSS. Some relate to the amount of space available to FDI sites. The *Local Competition Order* ¶ 390, quoted above, specifically addresses BA's objection (Post-Hearing Brief at 31) that "[s]pace limitations within FDI cabinets alone render subloop unbundling technically infeasible." See also *Local Competition Order* ¶ 201. We note, however, as did the FCC, that if there is insufficient space at a particular location, and a new facility must be built at MMTP's expense, that consideration may be of far greater practical significance to MMTP than a ruling that lack of space does not constitute technical infeasibility.¹²

We cannot resolve BA-ME's remaining concerns on the basis of the briefs and the present record. As discussed above, we will use a supervised bona fide request (BFR) process within the section 1303 proceeding to address those issues, assuming that we make the other two required findings. BA-ME stated in its briefs:

The only way to investigate, test, and evaluate these issues is through joint Mid-Maine/BA-ME technical and operational field tests as part of the BFR process. BA-ME is willing to pursue this BFR work if Mid-Maine is similarly willing to commit resources to the effort. Without further detailed technical definition and development by both parties

¹²The FCC stated:

Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.

Local Competition Order ¶ 199.

(and equipment vendors), the specifics of how to provide sub-loop unbundling, and the related costs to maintain the reliability and security of both carriers' networks, and provide a quality service, cannot be known.

BA Direct Presentation at 33.

The [BFR] process is the means by which any CLEC may request a customized network arrangement not generally offered or available from BA-ME. The BFR process is roughly analogous to BA-ME's retail practice of "special assembly" or "individual case basis." It is a practical, administrative vehicle to assess whether a CLEC's individualized request can be accommodated by BA-ME, in whole or in part. In essence, the BFR process calls for BA-ME to evaluate the CLEC request and report back whether and how the request can be accommodated and what the applicable cost to the CLEC would be for the customized arrangement. The BFR process has been recognized by the Maine Commission [in the BA-AT&T arbitration] as the appropriate vehicle for pursuing greater network unbundling.

BA Post-Hearing Brief at 36. BA cites several cases that it claims ordered a BFR process for determining the feasibility of various unbundling requests.

MMTP's position on whether to use the BFR process is not entirely clear. Its Combined Brief states that several state commissions have ordered subloop unbundling and that many of those required a BFR process. MMTP does not specifically object to the use of the BFR in its discussion of this issue. Nor does it otherwise object to BA's BFR process as a whole.¹³

MMTP has expressed concerns about the length of time that a BFR process might take. During a telephone conference the parties discussed the possibility of a BFR process that would be supervised or monitored by Commission Staff.

The BFR process to address the question of access at technically feasible points will be subject to the following conditions:

1. The parties will conduct a BFR process with respect to no fewer than two locations, unless they agree to only one location.

¹³The issue we consider at Issue P1 (Bona Fide Request Process) in the March 25 Order is not the validity of the process itself, but whether it must be applied when it has already been applied to an identical or nearly identical network element or service.

2. The advisors assigned to this case will monitor the process. They also have the authority to establish reasonable deadlines for various stages in the BFR process, to extend deadlines for cause and resolve other procedural disputes between the parties.

3. For good cause, the Commission may delegate further supervisory power to the advisors.

For subloops, we must also address the "impairment" issue, subject under the principles established by the Supreme Court. The existing record reasonably establishes the particular type of service that MMTP seeks to offer and the use it would make of BA-ME subloops. What is lacking is any evidence of the comparison among the costs that MMTP would incur if it were to use subloops obtained from BA-ME, if it were to provide the service using its own facilities, and if it were to obtain network functions from third parties.¹⁴

B. Extended Links

MMTP, at least at present, plans to place a relatively small number of switches in the State of Maine. That limited number of switches will provide switching functions to customers in all locations in Maine to which MMTP will provide local exchange service. To provide local exchange service, MMTP must provide local loops that extend from its switches to its customers' premises. It must either build its own loops or purchase them from BA-ME. A local loop is an unbundled network element (UNE) established by the FCC pursuant to 47 U.S.C. § 151(c)(3) and (d). See 47 C.F.R. § 51.319.¹⁵

Within the area that MMTP plans to serve, it will have substantially fewer switches than does Bell Atlantic. In fact, Bell Atlantic usually has at least one switch in each of its exchanges. Because BA-ME generally has one or more switches in every exchange in the State, and because local loops by definition normally do not cross exchange boundaries, Bell Atlantic's loop lengths are relatively short compared to the loop facilities that MMTP will need for its customers that are located long distances from its smaller number of switches. In most cases, Bell Atlantic does not have available for purchase the kind of local loops that cross its exchange boundaries and, hence, that would satisfy MMTP's needs for its far-distant customers.

¹⁴The record does contain evidence of a comparison between the *relative* costs to MMTP of providing the service with copper versus fiber and electronics, but there is no evidence of actual cost in dollars.

¹⁵47 C.F.R. § 51.319(a) defines a "local loop" as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." See discussion of the U.S. Supreme Court's vacation of this regulation below.

To provide service in the manner described above, MMTP wants to purchase two separate unbundled network elements (a "local loop" and an "interoffice transport facility") and connect them to constitute an "extended link." Both of those UNEs were established by the FCC in the *Local Competition Order*. See 47 C.F.R. § 51.319. A "local loop" runs between a Bell Atlantic wire center and a customer's location. An "interoffice transmission facility" runs from one BA wire center to another, for example, from the BA wire center that is located in the vicinity of MMTP's switch to the BA wire center at which the proposed loop to the customer is located. An interoffice transmission facility can be dedicated to one carrier or shared among carriers. 47 C.F.R. § 51.319(d)(1).¹⁶ It is capable of being used for local or toll trunking, or in a dedicated manner as a dedicated private line, as the private line component of foreign exchange service, and for special access. Finally, as MMTP intends in this case, it could be used as a component of an extended loop. MMTP plans to connect an "interoffice" transmission facility and a local loop to form an "extended loop" running from MMTP's switch to MMTP's customer.

We must address if and how MMTP will be permitted to connect the two facilities: (1) the interoffice transport facility that terminates at the BA wire center located in the vicinity of its customer; and (2) the loop running from that same wire center to the MMTP end user, so that the two UNEs combined will provide an extended link. In essence, we will resolve whether we can and should establish a *new* UNE known as an extended link.

We observe that the status of the FCC's rules concerning the combination of UNEs is confusing. While the Supreme Court's logic for resuscitating the FCC's rule preventing "splitting" already combined elements (47 C.F.R. section 51.315(b)) would seem to apply with equal force to the FCC's rule requiring combination of UNEs (47 C.F.R. section 51.315(c)), the latter section remains vacated under the Eight Circuit's decision. Because our analysis in the § 1303 proceeding will focus on whether we should create a *new* UNE (made up of the interoffice transport and the loop) -- for which our authority is clear -- we are not confronted with the question of whether we have the authority, under federal law or otherwise, to require the "combination" of two or more pre-existing UNEs. This answers Bell Atlantic's argument that such an approach is "preempted" by the Eighth Circuit ruling that TelAct section 251 (c) (3) does not require ILECs to combine elements. The authority under the TelAct to establish a UNE

¹⁶47 C.F.R. § 51.319(d)(1) defines "interoffice transmission facilities" as:

incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

is independent of any authority the FCC purported to find under the TelAct to require ILECs to combine UNEs. The fact that one section of federal law provides a basis for a result does not preclude using another section of federal law to achieve that same result. Federal law may *preempt* inconsistent *state* law, but one ruling that interprets one federal law cannot "preempt" a valid interpretation of a different federal law.

In determining whether we should establish extended links as a UNE, we must address the three factual questions described in subpart A above. The first is whether an extended link is part of BA-ME's network. The record indicates that BA-ME provides foreign exchange service. That service is typically provided with a local loop and an interoffice transmission facility. The local loop terminates in the local central office and is connected to the interoffice transmission facility with a cross-connect. The interoffice transmission facility runs from the "local" central office and terminates at the main distribution frame of the switch in a "foreign" exchange. Similar dedicated services, such as interexchange private lines and special access facilities, are also configured using local loops and interoffice transmission facilities. In the section 1303 proceeding we will explore whether the combinations of local loops and interoffice transmission facilities, such as those described above, constitute a piece of BA-ME's network that, if unbundled, can be used for extended link purposes.

The second issue we must consider is whether access to extended links is technically infeasible. Thus far, BA-ME does not appear to have made any such claims. As discussed above, the FCC has ruled that BA-ME must prove that access is not technically feasible.

Finally, we must determine whether MMTP's ability to provide the service it seeks to offer would be impaired if we do not require access to unbundled extended links. We must first determine what service(s) MMTP proposes to offer with extended links. Because extended links include interoffice facilities, they are quite lengthy and most probably will not be useable for the xDSL services that MMTP seeks to offer using copper facilities and subloops. It is likely, therefore, that MMTP will use extended links for routine forms of local exchange service. Under the Supreme Court's interpretation of TelAct Section 251(d)(2)(B), the record must demonstrate that the alternatives available to MMTP for providing local exchange service (or other services MMTP seeks to offer with extended loops) are either inferior in quality or more expensive by more than *de minimus* amounts. The record must include comparisons to other means by which MMTP could provide the service(s) and means available from third parties.

In connection with the impairment issue, one alternative we will consider is whether it is economical for MMTP to obtain extended links using collocation. That MMTP may connect local loops and interoffice transmission facilities using collocation is undisputed. Both parties, however, appear to assume that collocation requires a CLEC to obtain a specific set of facilities and space. We will address whether that assumption is correct. The TelAct states simply that ILECs must "provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network

elements at the premises of the local exchange carrier" 47 U.S.C. § 251 (c) (6). The *Local Competition Order*, ¶ 598 states that "collocation requires reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities, and have a cage requirement."

More recently, however, the FCC has ruled that ILECs must provide "cageless" collocation upon request, without requirements that collocators rent a minimum space or that their facilities must be located only in a designated area of the CLEC's premises. ILECs may require reasonable security arrangements but must allow a CLEC full-time access to its equipment. *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (released March 31, 1999) ¶¶ 39-49. The FCC also ruled that one collocator may cross-connect with another collocator's equipment on the same premises, and that ILECs cannot insist that only they may provide the cross-connections. The FCC reasoned that "cross-connect facilities . . . are often as simple as a transmission facility running from one collocation rack to an adjacent rack." ¶ 33. While the ruling is limited to cross-connects between collocators, the logic used by the FCC might also be applicable to cross-connects between the equipment (including UNEs obtained from the ILEC) of a single CLEC.

In addition to using collocation as a comparison for purposes of deciding the impairment issue, we will also explore the possibility that MMTP may obtain extended links (or their functional equivalent) through collocation, and whether we may thereby avoid the need to establish extended links as an additional UNE.

III. CONCLUSION

For the reasons stated herein, we conclude that we have the authority if the evidence supports certain findings of fact, to order BA-ME to provide access to subloops and extended links as unbundled network elements. We open a proceeding under 35-A M.R.S.A. § 1303 to gather and assess that evidence.

Dated at Augusta, Maine, this 9th day of April, 1999.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch

Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.